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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JOSE OJEDA,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Questions Presented for Review

1. Does a jury instruction that the presence of a firearm in a car is presumptive evidence that the car's occupant knowingly possessed the firearm violate the Fourteenth Amendment's Due Process Clause when there is no other evidence connecting the occupant and the firearm?

2. Does the Fourth Amendment prohibit state law enforcement authorities from searching a car when it has been stopped for a routine traffic infraction and there is no other ground upon which to find reasonable cause for the search?

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Opinions Below

The New York State Court of Appeals denied leave to appeal. The Appellate Division of the Supreme Court of the State of New York in and for the First Department affirmed the judgment convicting the defendant without opinion. The opinion of Justice P. McQuillan denying petitioner's pre-trial motion to suppress is not reported and appears in Appendix D hereto.

Jurisdiction

The petitioner, Jose Ojeda, respectfully prays that a writ of certiorari issue to review the judgment of conviction entered against him on October 19, 1981, which

was affirmed without opinion by the Appellate Division of the Supreme Court and denied further review by the New York State Court of Appeals.

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Penal Law § 265.15(3)

The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chuka stick, sandbag, sandclub

or slingshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

Statement of the Case

The Facts

On September 5, 1980, shortly after 5:00 a.m. in Manhattan, as New York City Police Officers Dugan and Ohrnberger were on radio patrol, they passed a car with a Wisconsin license plate double parked on the opposite side of the street. Two people were in the front seat. Proceeding for another block, the officers made a "U-turn" and then observed the Wisconsin-licensed car, now with only one person in it, pull away and turn left without making a left-hand turn signal. Following the car for one half-block, the officers drove up to the car, which had parked, and observed the now sole occupant, the petitioner Jose Ojeda, alight. Approaching on foot, Officer Dugan demanded petitioner's license and registration. Petitioner gave his name, produced a bank credit card and told Officer Dugan that he was parking the car for his friend, whom he also named. While Officers Dugan and Ohrnberger watched, petitioner then retrieved from the glove compartment a rental agreement which bore the names of two authorized drivers, neither of which was the named friend for whom petitioner was parking the car.

Officer Ohrnberger then returned to the police cruiser and, using a special radio, sent the license number of the car to a New York State computer which listed stolen cars. He received a response that the car was not stolen. At trial Officer Ohrnberger contradicted Officer Dugan and testified that petitioner, after obtaining the registration papers, momentarily rested his elbows on his knees with his hands out of sight between his knees while sitting on the driver's side of the car. Officer Ohrnberger ordered petitioner to get out of the car and began searching its interior. Both officers agree Officer Ohrnberger found a revolver hidden under the front seat on the passenger side. Petitioner was then arrested and subsequently indicted for criminal possession of a weapon in the third degree in violation of New York Penal Law § 265.02.

The Pre-Trial Suppression Hearing

Petitioner raised the claim that his Fourth Amendment rights were violated prior to the trial by motion to suppress use of the firearm as evidence. On May 8, 1981, New York State Supreme Court Justice P. McQuillan denied petitioner's motion to suppress the weapon, finding that the police had probable cause to believe both that the vehicle had been stolen and that a search of the vehicle might produce evidence of the theft.[1] The case then proceeded to trial.

The Trial Judge's Charge

Petitioner raised the claim that his Fourteenth Amendment rights were violated by the trial judge's charge by objection prior to the giving of the offending charge to the jury and by exception thereafter.[2] The trial judge in-

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[1] A copy of Justice McQuillan's opinion is set forth in Appendix D hereto.

[2] Copies of the relevant portions of the trial transcript containing the relevant objections are set forth in Appendix E hereto.

structed the jury that any person occupying a car at the time a firearm is found therein may be presumed to have knowing possession of the firearm.[3] Three hours after the jury commenced deliberations, it returned with a question regarding the law on presumption as follows:

> The Court: Madam Forelady, we have your question at 2:10. It says, "could you review with the jury the section of the law that you interpreted about inference —we believe that you said that if a person is in a car which is not a public omnibus or a stolen car and the gun is present, we may conclude that the person had possession of the gun." (Trial Transcript p. 174)

In response to this request the trial judge twice repeated his presumption charge. Shortly thereafter petitioner was found guilty of criminal possession of a weapon in the third degree. On October 19, 1981, petitioner was sentenced to forty-five days' imprisonment to be served on weekends plus five years' probation. He has been released on bail pending determination of this petition.

State Court Appeals

Petitioner appealed as of right to the New York State intermediate appellate court, the Appellate Division of the Supreme Court of the State of New York, in and for the First Department on November 13, 1981. The judgment of conviction was affirmed on September 16, 1982 without opinion. Application was then made for leave to appeal to the New York Court of Appeals on October 7, 1982.[4] Permission for leave to appeal was denied on November 23, 1982.[5]

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[3] A copy of the trial judge's charge is set forth in Appendix E hereto.

[4] A copy of the letter requesting leave to appeal is set forth in Appendix B hereto.

[5] Copies of the orders of the appellate courts are set forth in the Appendices A and C hereto.

REASONS FOR GRANTING THE WRIT

1. The use of the presumption that the presence of a firearm in a car is prima facie evidence of knowing possession of the firearm by all those occupying the car at the time the firearm is found violated petitioner's Due Process rights under the Fourteenth Amendment to the United States Constitution because there was no rational connection between his occupancy of the car and the presumed fact of petitioner's knowing possession of the firearm hidden in the car.

The judgment of conviction entered against the petitioner in this case should be summarily reversed on the opinion of this Court in *County Court of Ulster Cty.* v. *Allen,* 442 U.S. 140 (1979) because the trial court improperly charged the jury as to presuming a material element of a crime. Consequently, petitioner believes the state courts have decided a federal question in a way which is in conflict with the applicable decision of this Court and certiorari should be granted.

Ulster County and its progenitors require that there be a rational connection between the basic facts which the prosecution proved and the ultimate fact which the jury is asked to presume, *i.e.,* that the petitioner knowingly possessed the hidden firearm. While the use of most[6] of the language in the permissive presumptive charge given by the trial judge was approved by the majority of this Court in *Ulster County,* Justice Stevens carefully reiterated the rational connection standard originally articulated in *Tot* v. *United States,* 319 U.S. 463,

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[6] The trial court charged the jury that they may presume *knowing* possession by the petitioner. This exceeds the presumption authorized to be given by New York State statute. The statute, New York Penal Law § 265.15(3), does not authorize use of the word "knowing" nor the charging of the element of knowledge. This issue was not addressed by the Court in *Ulster County.*

467 (1943), and required that the ultimate fact which the jury is asked to presume must be "more likely than not to flow from" the basic facts proven. 442 U.S. at 166 (quoting from *Leary* v. *United States*, 395 U.S. 6, 39 (1969)). In the case at bar there were no basic facts proven from which one could rationally conclude that petitioner knew of the gun, much less that he exercised dominion and control over it. Unlike the facts before this Court in *Ulster County*, the gun here was not in plain view; there were not several large guns, but rather one small hand gun, and absolutely nothing in the behavior of petitioner suggested that he had knowledge of the gun. All that was proven here was that petitioner occupied the car, that he was not authorized to drive the car pursuant to the terms of the rental agreement, and that petitioner placed his hands between his knees for a moment.[7]

These facts are insufficient to establish the requisite rational nexus between petitioner and the gun. This is especially true when these facts are viewed in the context of the rest of the evidence. At the time of the search, petitioner had been alone in the car for only a few seconds, the car was *not* known to be stolen, petitioner was sitting on the driver's side and could not have touched the gun under the seat on the passenger's side and, even as Officer Ohrnberger admitted, petitioner never had a gun in his hands or anywhere on his person.

On the basis of the totality of this evidence, it is just as likely that petitioner's friend or the lessor of the car, neither of whom the police arrested or even tried to contact, was the knowing possessor of the gun. There is certainly no rational connection between petitioner and the gun, and therefore no reason to utilize a presumption.

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[7] In order to have found this as a fact, the jury would have had to have credited Officer Ohrnberger's testimony over that of Officer Dugan.

The operation of the presumption places petitioner in an unfair legal predicament; although he was presumed to have knowing possession of the weapon found in the search, he apparently would have no standing under *Rakas* v. *Illinois*, 439 U.S. 128 (1978), to contest the legality of the search because he has no ownership interest in the car, having been the driver for only twenty seconds, and because he has no ownership or possessory interest in the gun. The practical effect of this legal predicament is to obviate the need for a jury and require conviction by operation of law.[8] This Court should clearly establish that where a defendant may be presumed by operation of law to have possession of an incriminating object, he must also have legal standing to contest the manner in which law enforcement authorities discovered the object.

Petitioner asks this Court to grant certiorari and reverse the judgment of conviction entered against him.

2. The Court's decision upholding the search of the car cannot be justified as a car search under United States v. Ross, and there is a conflict between circuits as to whether it can be upheld as a protective stop and frisk under Terry v. Ohio and its progeny.

Although there is substantially less protection for automobiles and their contents under the Fourth Amendment, *see, Carroll* v. *United States*, 267 U.S. 132 (1925); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *United States* v. *Ross*, —— U.S. ——, 102 S.Ct. 2157 (1982), probable cause

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[8] The lower courts never considered this aspect of the presumption. The prosecutor at the hearing on the motion to suppress the search did not raise the standing issue and Justice McQuillan apparently assumed standing. On appeal to the Appellate Division the prosecutor argued that petitioner lacked standing, but the Appellate Division did not decide the question. It is not clear whether Judge Fuchsberg of the New York Court of Appeals assumed standing when denying petitioner leave to appeal.

still must exist to conduct a search. A determination must be made based on objective facts that could justify the issuance of a warrant, and not merely the good faith of the officers. *United States* v. *Ross*, —— U.S. at ——, 102 S.Ct. at 2164. The facts of this case do not support the finding of probable cause to search petitioner's car which was made by Justice McQuillan in denying petitioner's pretrial motion to suppress.

Petitioner was stopped by Officers Dugan and Ohrnberger after committing a traffic infraction by turning left without signalling. Upon being stopped, petitioner alighted from the car and produced a bank credit card for identification, as well as a rental agreement that did not contain his name or the name of his friend for whom petitioner was parking the car. Officer Ohrnberger radioed the car's license number into the Police Department, and was informed that the car was not reported stolen. At this point, the officer did not arrest petitioner, nor cite him for any violation. Instead, Officer Ohrnberger demanded the keys and began searching the inside of the car. Only when a gun was found, was petitioner arrested.

In order to stop a car to search it, a police officer must have probable cause to believe that the vehicle contains contraband or other evidence of a particular crime, or that it is involved in the commission of a crime. *Carroll* v. *United States*, 267 U.S. 132 (1925); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). In the case at bar, there was no reason to believe that the car petitioner was driving contained any contraband, or that it was involved in a crime.[9] *Accord, United States* v. *Ross*, —— U.S. ——, 102 S.Ct. 2157 (1982). Despite the fact that the officers at the time of the search had been advised by the Police Depart-

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[9] Petitioner did not commit a "crime" by turning without signalling. He violated N.Y. Vehicle and Traffic Law (VTL) § 1163, which is defined as a "Traffic Infraction" in VTL § 1101. Although a police officer in New York is empowered to arrest when he has reasonable cause to believe any offense has been committed

(*footnote continued on following page*)

ment that the car had not been reported stolen, Justice McQuillan, without explanation, found that they had probable cause to believe that the car was stolen.

If no probable cause existed to search the car, as in this case, the only other way that the pre-arrest search by the police can be justified is if it was an investigatory "stop and frisk" under *Terry* v. *Ohio*, 392 U.S. 1 (1968). A frisk of the petitioner would have been justified if the officers "had reason to believe that [they were] dealing with an armed, dangerous individual." 392 U.S. at 27. However, the officers did *not* proceed to frisk petitioner, but rather, assuming the truth and accuracy of Officer Ohrnberger's testimony, he observed the petitioner place his hands between his knees, then ordered petitioner out of the car and proceeded to "frisk" the car, not the petitioner.

Circuit Courts of Appeals are divided on whether a *Terry* frisk can include the inside of a car that the subject was driving and to which he is likely to return. *United States* v. *Rainone*, 586 F.2d 1132 (7th Cir. 1978), *cert. denied* 440 U.S. 980 (1979) held that such a frisk of a car was constitutional. In *Rainone*, the defendants were ordered out of the car after being stopped under what the court termed "obviously suspicious circumstances". Both defendants were given pat-down searches and nothing was found. The police then looked inside the car and felt under the seat, finding dynamite. The Court found that it was a

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(*footnote continued from preceding page*)

in his presence (N.Y. Criminal Procedure Law § 140.10), and for the purpose of warrantless arrest, a traffic infraction is an offense (VTL § 155; N.Y. Penal Law § 55.10), New York courts have interpreted the law as not intended to authorize a *search* of a person for a traffic offense unless there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than a mere traffic offense. *People* v. *Marsh*, 20 N.Y.2d 98 (1967). Although *United States* v. *Robinson*, 414 U.S. 218 (1973) upheld the full search of a person arrested for a traffic offense, it did not discuss searching the vehicle.

valid *Terry* stop and frisk and that the scope of the stop and frisk included the inside of the car because of the risk that the suspect could return to the car and obtain weapons. Other circuits have applied a similar rule. In *United States* v. *Green*, 465 F.2d 620 (D.C. Cir. 1972), the car was stopped for running a stop sign and the officer saw the defendant make "furtive gestures" indicating he was armed. After ordering the defendant out of the car, the officer looked under the car seat and found a gun. The frisk of the car was upheld under *Terry* as being a self-protection measure. *See also, United States* v. *Wilkerson*, 598 F.2d 621 (D.C. Cir. 1978). However, the Fifth Circuit, in *Government of Canal Zone* v. *Bender*, 573 F.2d 1329 (5th Cir. 1978), refused to extend the *Terry* frisk to the inside of a car. Like the case at bar, in *Bender*, the defendants were ordered out of the car and one of the officers stood between the car and the defendants. The other officer found contraband in the car. The Fifth Circuit refused to uphold the frisk, noting that, as in petitioner's circumstances, neither defendant had been frisked before the car was, thereby completely defeating the protective rationale of *Terry*. The court wrote: "To allow the scope of a *Terry* search to extend outside the area of immediate control would be to sever the *Terry* exception from its rationale". 573 F.2d at 1332. *See also, United States* v. *White*, 648 F.2d 29, 43 at n. 48 (D.C. Cir.), *cert. denied* 454 U.S. 924 (1981) ("The right to stop does not include any right to frisk unless there is a particularized reason to believe the occupants are carrying weapons. It also does not include the right to search the car other than to look inside for objects 'in plain view'.")

While there was clearly not sufficient cause to search the car when parked after the petitioner committed a traffic infraction, there was enough to justify a *Terry* stop, and to order the petitioner out of the car under

Pennsylvania v. *Mimms*, 434 U.S. 106 (1977). Although this Court has never extended the *Terry* frisk to include a car, the Circuit Courts are in conflict as to this issue, an issue of significant constitutional importance which warrants this Court's consideration.

Therefore, in order to resolve the present conflict between the Circuits presented by this case, the Court should grant certiorari.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the order denying leave to appeal to the New York State Court of Appeals.

Dated: New York, New York
January 21, 1983

Respectfully submitted,

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